

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL)
PRAIRIE RIVERS NETWORK, and)
SIERRA CLUB,)
) PCB 13-17
Petitioners,) (Third-Party NPDES Permit Appeal)
)
 v.)
)
ILLINOIS ENVIRONMENTAL PROTECTION) PCB 13-65
AGENCY and DYNEGY MIDWEST) (Citizens Enforcement – NPDES)
GENERATION, INC.,)
)
Respondents.)

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **Response in Opposition to Motion to Consolidate**, copies of which are herewith served upon you.

DYNEGY MIDWEST GENERATION, INC.,


By: Amy Antonioli

Dated: May 31, 2013

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RESPONSE IN OPPOSITION TO MOTION TO CONSOLIDATE

Respondent Dynegy Midwest Generation (“DMG”), by its attorneys, Schiff Hardin, LLP, respectfully opposes and asks the Illinois Pollution Control Board (“Board”) to deny the Motion to Consolidate (the “Motion”), filed electronically by the Natural Resources Defense Council, Prairie Rivers Network, and the Sierra Club (collectively, the “Citizen Groups”) on May 15, 2013 and received by DMG at the Havana Power Station, Mason County, Illinois on May 17, 2013. This response is timely filed in accordance with 35 Ill. Adm. Code 101.500(d). After providing the Board with a brief background summary, this pleading delineates the reasons for which the requested consolidation is inappropriate.¹ In support of this Response in Opposition to Motion to Consolidate, DMG respectfully states as follows:

¹ DMG intends to timely file, on or before June 17, 2013, a Motion to Dismiss the Complaint for various reasons, including a lack of jurisdiction. While reserving the right to detail such arguments within that motion, DMG respectfully here submits that absence of Board jurisdiction regarding the Complaint while the Permit Appeal is pending warrants denial of the Motion independently of the other reasons detailed in this pleading.

I. Background Summary

1. On October 18, 2012, the Citizen Groups filed a third-party permit appeal, contesting the Illinois Environmental Protection Agency's ("IEPA's" or "Agency's") issuance of NPDES Permit No. IL0001571 (the "Permit") to DMG² for its Havana Power Station located in Havana, Mason County, Illinois. *Natural Resources Defense Council, et al v. IEPA*, PCB 13-017 (filed October 18, 2012) (the "Permit Appeal").

2. On May 15, 2013, the Citizen Groups filed, pursuant to 35 Ill. Adm. Code 309.182 ("Rule 309.182"), a Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency (the "Complaint"). *Natural Resources Defense Council, et al v. IEPA*, PCB 13-65 (filed May 15, 2013).³ Specifically, the Complaint asserts that post-Permit issuance monitoring data constitutes a "change in any circumstance" under Rule 309.182(b)(3) that "mandates either a temporary or permanent reduction or elimination" of discharges allowed by the Permit. Complaint, ¶ 20.

3. Also on May 15, 2013, the Citizen Groups filed the Motion seeking to consolidate the Permit Action and Complaint pursuant to 35 Ill. Adm. Code 101.406 ("Rule 101.406"). In full, Rule 101.406 states as follows:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The

² Dynegy Midwest Generation, Inc. was merged into Dynegy Midwest Generation, LLC on August 4, 2011. Although timely notice of the same was provided to the IEPA, the Permit, as issued, refers to Dynegy Midwest Generation, Inc.

³ DMG understands that the Complaint may be the first of its kind under Rule 309.182 and thus may constitute a case of first impression for the Board. In part, Rule 309.182 states as follows:

Any person, whether or not a party to or participant at any earlier proceeding before the Agency or the Board, may file a complaint for modification, suspension, or revocation of an NPDES Permit in accordance with this Section and Part 103.

35 Ill. Adm. Code 309.182(a). Consistent with Rule 309.182, the Citizen Groups' filing constitutes a complaint subject to the Board's procedural rules for enforcement proceedings (35 Ill. Adm. Code Part 103).

Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary.

In other words, under Rule 101.406, a party seeking consolidation must establish that:

- (1) consolidation is in the interest of convenient, expeditious and complete determination of the claims;
- (2) consolidation will not cause material prejudice to any party; and
- (3) the burdens of proof in various proceedings do not vary.

Presumably with these three criteria in mind, the Motion concludes (without explanation), with respect to criteria (2) and (3) described above, that consolidation of the two matters is appropriate as such would “not cause prejudice to any party” and “the burden of proof in both matters is expressly on the Petitioners.” Motion, ¶ 4. As will be demonstrated in Parts III and IV below, consolidation would, in fact, result in material prejudice to DMG and the respective burdens of proof vary, regardless of the fact they are borne by the same party. The Motion thus fails to meet either criteria (2) or (3) of Rule 101.406.

With respect to criterion (1), the Motion’s full contention is as follows:

Consolidation of the Permit Appeal and the [Complaint] is in the interest of convenient, expeditious, and complete determination of claims in both matters. The two actions are grounded in the identical set of facts, with the only difference being that the [Complaint] is additionally grounded in claims based on the DMRs submitted after the Permit was issued. It would be inefficient, and serve no purpose, to consider the two closely related actions separately; and doing so would risk conflicting outcomes.

Motion, ¶ 3. As will be illustrated below, contrary to the afore-stated contentions of the Motion, the two proceedings are based on entirely different facts, different legal standards, different schedules, different burdens of proof and are wholly unrelated in all material ways. Accordingly, the Motion also fails to meet Rule 101.406 criterion (1).

II. Consolidation Would Be Impractical And Inconvenient And Would Preclude A Proper And Complete Determination Of The Permit Appeal or Complaint.

4. The Complaint and Permit Appeal are governed by fundamentally different procedural rules thereby making consolidation of the proceedings impractical and inconvenient. *Village of South Elgin v. Waste Management of Illinois, Inc.*, PCB 03-106 (Feb. 20, 2003) (stating “enforcement actions and petitions for review are governed by fundamentally different procedural rules thereby making consolidation of the petition for review proceeding with the enforcement action impracticable and inconvenient”). Permit appeals are subject to Part 105, Subparts A and B of the Board’s procedural rules, while the Complaint is subject to Part 103 for enforcement proceedings. 35 Ill. Adm. Code 105, Subparts A and B; 35 Ill. Adm. Code 103 *et seq.* There are numerous differences in the procedural rules that apply to the two proceedings. For example, the rules allow time for the filing of an answer in the Complaint proceedings.⁴ 35 Ill. Adm. Code 103.204(d). That rule does not apply to permit appeals. Permit appeal proceedings before the Board are subject to a 120-day decision deadline. 35 Ill. Adm. Code 105.114. Although DMG has filed an open waiver of decision deadline in the Permit Appeal, the Board’s procedural rules allow DMG to reinstate the 120-day decision period by filing a notice to reinstate. 35 Ill. Adm. Code 101.308(c)(1). An enforcement action such as the Complaint, however, entails no decision deadline. A discovery schedule could be requested and allowed by the Board in the Complaint proceedings (35 Ill. Adm. Code 101, Subpart F) while the Permit Appeal is limited to the administrative record. 415 ILCS 5/40(e)(3)(ii). A discovery schedule alone may very well prevent consolidation since such schedule would likely be irreconcilable with a decision deadline in the Permit Appeal.

⁴ Another procedural rule applicable in enforcement proceedings that does not apply in permit appeals is the complaint must notify the respondent of the consequences of failing to file an answer to the complaint. 35 Ill. Adm. Code 101.204(f).

5. In addition to differing procedural rules, the Permit Appeal and Complaint (if properly pled) entail substantively very different subject matter, facts, and legal standards. In the Permit Appeal, the Citizen Groups claim that the IEPA failed to act in accordance with law in issuing the Permit based on information then before the Agency. Such issues are not properly at issue in the Complaint proceedings. Instead, the Complaint proceedings (if somehow allowed to continue) would concern whether new information not previously before the IEPA (*i.e.*, changed circumstances) mandate modification of the Permit. Beyond the fact that both actions of the Citizen Groups seek to alter Permit terms, there is no subject matter or factual overlap between the two proceedings. The Citizen Groups have ignored this fact and attempted to disguise two proceedings as similar simply by inappropriately restating claims of the Permit Appeal within the Complaint.

6. The Motion also asserts, again without explanation, that the lack of consolidation would risk conflicting outcomes of the Permit Appeal and Complaint. Motion, ¶ 3. We fail to see how such a risk could possibly arise given that differing nature and scope of the two proceedings. Moreover, for reasons we will detail in a later pleading concerning the merits of the Complaint itself, the only even possible way for the Citizen Groups to now proceed with the Complaint is to first dismiss the Permit Appeal.

III. Consolidation Would Result in Material Prejudice

7. Consolidating the Permit Appeal and Complaint under Rule 101.406 would violate the Illinois Environmental Protection Act (“Act”) and materially prejudice DMG.⁵ Among other differences, the two proceedings differ with respect to the information the Board may rely upon in making its decision. Under Section 40 of the Act, “[t]he Board must hear a

⁵ DMG notes that consolidation could also materially prejudice the IEPA in the same way as DMG but leaves it to the Agency to assert the same.

third-party NPDES permit appeal 'exclusively on the basis of the record before the Agency.'" *American Bottom Conservancy v. IEPA and U.S. Steel Corp.*, PCB 06-171 (May 6, 2010); citing 415 ILCS 5/40(e)(3)(ii); 35 Ill. Adm. Code 105.214(a). "The Board may not consider information developed by the IEPA or the permit applicant after the Agency's decision." *Rock River Reclamation Dist. v. IEPA*, PCB 13-11 (May 2, 2013); citing *Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

8. In contrast, the Complaint (based on purported changed circumstances) inherently does not (or should not) concern the validity of a prior IEPA action.⁶ Instead, it contends that new information not previously before the IEPA warrants Board action. Consequently, the Board's scope of review for the Complaint is exclusive of any prior administrative record. In other words, for the Permit Appeal, the Board may only consider evidence that was before IEPA *at the time* it made its decision to issue the Permit; for the Complaint, the Board is limited to considering evidence of circumstances that changed *since the time* of the Permit's issuance.

9. In essence, the Motion represents an improper backdoor attempt by the Citizen Groups to introduce new information (*i.e.*, post-Permit issuance discharge monitoring reports) outside of the administrative record into the Permit Appeal. Doing so would materially prejudice DMG's rights under Section 40 of the Act which limits the scope of the Permit Appeal to information before the Agency when it made the decision to issue the Permit. 415 ILCS

⁶ Notwithstanding the fact that a Rule 309.182 filing based on changed circumstances is, by definition, to be based on new information, the Complaint inappropriately asserts and repeats claims of the Permit Appeal. We note too that, among other misstatements, the Motion incorrectly and incompletely states the Illinois River mercury water quality standards and misstates the values reflected on submitted discharge monitoring reports. Motion, ¶ 17 (pages 7 and 9).

5/40(e)(3)(ii). Allowing the Board to consider information generated *after* the date of IEPA's Permit issuance via a consolidation would effectively amount to a *de novo* review of the IEPA's decision to issue the Permit. The Board has previously held that such a review would "usurp the distinct function of the Agency as the permitting authority." *City of East Moline v. IEPA*, PCB 86-218, slip op. at 3 (Sept. 8, 1988); *citing* 415 ILCS 5/39(a); *IEPA v. IPCB*, 115 Ill. 2d 65, 503 N.E.2d 343 (1986).⁷

10. Similarly, it would materially prejudice DMG for the Complaint proceedings (based on purported changed circumstances) to entail claims concerning evidence within the administrative record at issue in the Permit Appeal.

IV. The Burdens of Proof in Permit Appeal and Complaint Vary

11. The Citizen Groups assertion that they bear the burden of production in both proceedings misses the point of the Rule 101.406 requirement that the burdens not vary among proceedings subject to a motion to consolidate. That is, the aforementioned criterion of Rule 101.406 are plainly not established by a simple assertion by the Citizens Groups that they bear the burden the proof in both the Permit Appeal and Complaint. Instead, the Citizens Groups needed to demonstrate that the burdens they bear in both proceedings do not vary. The Motion is absent any such demonstration (nor could it have included such a demonstration given that, as explained below, the burdens of proof vary among the two proceedings).

12. It is well-established that the "burden of proof" includes both the "burden of persuasion" and "burden of production." *Ambrose v. Thornton Township School Trustees*, 654 N.E.2d 545, 548 (1st Dist. 1995) (stating "the term 'burden of proof' means that the plaintiffs

⁷ In an analogous scenario involving an attempt to litigate issues associated with a permit issuance via a petition to modify under the federal NPDES rules, a court stated that "Congress did not intend petitions for modification to provide a second chance for full review of an NPDES permit after the statute of limitation has run from the issue or renewal of the permit." *Tex. Mun. Power Agency v. USEPA*, 836 F.2d 1482 (5th Cir. 1988).

have both the burden of producing evidence, as well as the burden of persuading the trier of fact that certain facts are true.”); Black’s Law Dictionary, p. 223 (9th ed. 2009).⁸ The Board has likewise recognized this distinction in a permit appeal proceeding. *Illinois Power Co. v. IEPA*, PCB 84-89, 84-90 (Oct. 12, 1984); citing *Marquette Cement Manufacturing Co. v. IPCB*, 84 Ill. App. 3d 434 (1980). In *Illinois Power*, the Board explained that the petitioner bears the burden of proof, which includes a burden of production. *Illinois Power*, PCB 84-89, 84-90, slip op. at 5. The burdens of production clearly differ between the Permit Appeal and Complaint. Specifically, with respect to the Permit Appeal, the burden of production can only be met by relying on material from the administrative record to show that issuance of the Permit violated the Act or Board regulations. The same is not true for the Complaint. In that proceeding, the Citizen Groups bear the burden to produce new evidence not in the administrative record establishing a change in circumstances that mandate a temporary or permanent reduction or elimination of the permitted discharge. Because the burdens vary, consolidation is improper under Rule 101.406.

V. Conclusion

13. The Motion fails to establish any of the three consolidation criteria of Rule 101.406. Specifically, the Motion fails to establish that (1) the consolidation is in the interest of convenient, expeditious and complete determination of the claims; (2) the consolidation will not cause material prejudice to any party; and (3) the burdens of proof in various proceedings do not vary. Moreover, as demonstrated in Parts II, III and IV above, consolidation would, in fact, be contrary to each of the criteria. Accordingly, the Motion must be denied.

⁸ Black’s Law Dictionary definition of “burden of proof” states “the burden of proof includes both the *burden of persuasion* and the *burden of production*.” Black’s Law Dictionary, p. 223 (9th ed. 2009). In turn, “burden of production” is defined as “A party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a preemptory ruling such as a summary judgment or a directed verdict.” *Id.*

WHEREFORE, DMG respectfully requests that the Board deny the Citizen Groups'
Motion to Consolidate.

Respectfully submitted,

DYNEGY MIDWEST GENERATION

By: 

Dated: May 31, 2013

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 31st day of May, 2013, I have served electronically the attached **Response in Opposition to Motion to Consolidate**, upon the following persons:

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and electronically and by first class mail, postage affixed, upon:

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